United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4250

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4250

ANGEL DONAY ALVARADO-SANTOS,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
ROBERT S. GROBAN, JR.,
Special Assistant United States Attorneys,
Of Counsel.

B
P/S

TABLE OF CONTENTS

TABLE OF CASES

PAGE

ADMINISTRATIVE DECISIONS

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4250

ANGEL DONAY ALVARADO-SANTOS,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

RESPONDENT'S BRIEF

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105(a), Angel Donay Alvarado-Santos (the "petitioner" "Alvarado" the "alien") petitions this Court to review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on July 19, 1976. That order dismissed the petitioner's appeal from the order of Immigration Judge Edward P. Emanuel finding the alien deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) in that the alien entered the United States without being inspected by federal immigration authorities and in violation of the law.

As in the civil administrative proceedings below the alien alleges that his initial arrest search and/or seizure

by the Immigration and Naturalization Service (the "Service") allegedly violated his rights under the Fourth Amendment of the United States Constitution and therefore the evidence underlying the finding of his deportability must be suppressed pursuant to the Fourth Amendment under the theory that it constituted "the fruit of the poisonous tree." As in the deportation proceedings below the alien seeks to have any deportation proceeding terminated on the theory that a claimed Fourth Amendment violation occurred when the alien's illegal presence first became known to the Service. Since the filing of this petition for review Alvarado has enjoyed the automatic statutory stay of deportation provided by Section 106(c) of the Act, 8 U.S.C. § 1105a(a).

Issues Presented

1. Was the alien given a fair and impartial hearing in the deportation proceedings below.

Statement of the Facts

Angel Donay Alvarado-Santos is a twenty four year old native and citizen of El Salvador who entered the United States on or about July 15, 1974 across the United States-Mexican international border near San Ysidro, California. He paid $250.00 to arrange his illegal entry and was thereafter transported to the United States. Since the time of his entry the alien has been illegally residing and working in the United States in violation of the immigration laws.

Upon his apprehension the Service commenced deportation proceedings with the issuance of an Order to Show Cause and Notice of Hearing dated September 19,

1975 (AR. p. 34).* This order charged that Alvarado was not a citizen of the United States but rather was a native and citizen of El Salvador who entered the United States without being inspected as required by Section 235 of the Act, 8 U.S.C. § 1225. The order further charged that he was subject to deportation under Section 241(a)(2) of the Act.

On October 21, 1975 the alien appeared at his deportation hearing accompanied by privately retained counsel (AR. p. 25). An official interpreter was provided by the Service to insure full and complete comprehension of these civil administrative proceedings. At the commencement of the hearing Judge Emanuel placed the alien under oath after which Alvarado admitted that his true name was "Angel Donay Alvarado-Santos" as charged in the Order to Show Cause. Judge Emanuel thereafter explained the nature of the proceedings and the charges lodged against the alien (AR. pp. 25-26). Pursuant to 8 CFR § 242.16(a) the Order to Show Cause was introduced into evidence and Judge Emanuel began to question Alvarado as to the allegations in the order concerning his birth and citizenship in El Salvador. At this point in the proceeding Alvarado's attorney submitted a notice of motion, and demanded that he be permitted to interrogate the alien preliminarily as to the facts underlying his arrest in order to shift the burden of proof to the government to justify the grounds for his arrest (AR. p. 26).** Judge Emanuel

---

* References proceeded by the letters A.R. are to the pages of the Certified Administrative Record previously filed with the Court.

** The notice of motion contained the bare allegation that the Service officer who arrested Alvarado had failed to elicit sufficient information concerning the alien's illegal status prior to the arrest and called upon the Service to justify the basis and facts

[Footnote continued on following page]

overruled the objection to his question regarding Alvarado's birth and citizenship, and deferred his ruling on counsel's motion to suppress and interrogate the alien on the underlying apprehension (AR. p. 26). The alien's counsel then permitted Alvarado to answer the Immigration Judge's inquiries subject to counsel's objection and request that he be permitted to testify as to his knowledge of the facts underlying his arrest.

Thereafter Alvarado readily testified and admitted that: (1) he was born in El Salvador and was a citizen of that country; (2) he was not a citizen of the United States; (3) he entered the United States by crossing the Mexican border on July 15, 1974 near San Ysidro, California; (4) he was not inspected and admitted as required by law (AR. p. 27).

Judge Emanuel then asked if Alvarado sought any form of discretionary relief to which the alien's counsel replied that Alvarado was seeking the discretionary privilege of voluntary departure under Section 244(e) of the Act, 8 U.S.C. § 1254(e) in lieu of enforced deportation. Judge Emanuel examined the alien to determine if Alvarado satisfied the basic requirements for the grant of voluntary departure under 8 C.F.R. § 244, *i.e.*, that he be ready and have the immediate means to depart promptly from the United States. After some discussion as to whether Alvarado was willing to abide by the requirements concerning the grant of that privilege, the alien finally stated his agreement to depart vol-

---

upon which it took the alien into custody. The notice also moved to suppress all information resulting from the arrest because "it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda Warnings as required by the United States Supreme Court" (AR pp. 35-36).

untarily in lieu of enforced deportation.* Counsel for the alien and the Service trial attorney then questioned Alvarado as to the alien's eligibility for discretionary relief. Finally Judge Emanuel inquired as to whether Alvarado had any family ties in the United States to which the alien responded in the negative.** At the close of the hearing the Immigration Judge rendered his decision reciting the alien's admissions relating to his alienage and the essential facts proving his deportability. In response to counsel's request to interrogate his client concerning the alien's apprehension by the Service, the Immigration Judge noted that the hearing was not a

---

* Immigration Judge to respondent:

Q. Mr. Alvarado, subject to other requests and other applications your lawyer has indicated that if you are ultimately found to be deportable that you ask to be excused from deportation by being allowed to leave this country by yourself, without cost to the government, a privilege called voluntary departure. Do you understand?

A. Sir, I came here with this lawyer and I paid this lawyer and I expect that this lawyer will defend me and I don't think that I should be in a position to have to pay my way out of the country because I want to stay in this country. That is my sole purpose of retaining a lawyer. (AR. p. 28).

* * * * *

A. If that be the case what is the use of an attorney. My boss retained an attorney to defend me. He expected that I would stay in the country. Otherwise I would have paid my own passage and leave without an attorney.

Mr. Oltarsh to respondent:

Q. That is all that I am asking him. That is all that that I am asking you. If you are granted the discretionary relief of leaving the country at some date in lieu of deportation would you do it if you have to do it?

A. I would. (AR pp. 29-30).

** Subsequently, after Judge Emanuel rendered his decision in which he found Alvarado to be deportable the alien admitted that this representation was false. (AR p. 32).

criminal proceeding and that deportability had been unqualifiedly established by the alien's own admissions.

On October 30, 1975 Alvarado appealed Judge Emanuel's decision to the Board of Immigration Appeals claiming: (1) that the Immigration Judge erred in failing to permit the alien to testify as to the facts surrounding his apprehension despite Alvarado's claim that he was arrested without probable cause; (2) that the Immigration Judge erred in declining to subpoena material witnesses at the hearing; (3) that the Immigration Judge failed to base his determination upon legally admissible evidence (AR. p. 6).

On July 19, 1976 the Board rendered a decision on the alien's application to terminate the deportation proceedings. The Board noted that athough evidence actually seized during an illegal arrest may be suppressed in a "criminal proceeding" an illegal arrest does not invalidate a subsequent deportation hearing. The Board also rejected the contention that an alien's physical presence is evidence that may be suppressed under the Fourth Amendment doctrine of the fruit of the poisonous tree. The Board held that there was no evidence in the record which was obtained as a result of the alien's arrest and that his testimony without more established deportability. The Board also noted that an inquiry into the facts surrounding the arrest was unnecessary therefore the Immigration Judge's denial of the alien's motion to suppress and request to present evidence on the issue was correct (AR. pp. 3-5). On July 26, 1976 the District Director of the New York Service district notified the alien to effect his voluntary departure on or before November 21, 1976. On November 15, 1976 Alvarado filed this petition for review.

ARGUMENT

The Alien Was Afforded His Fifth Amendment Right Of Due Process Of Law In The Deportation Proceedings Below.

The petitioner has consistently, both in the administrative proceedings below and in this petition for judicial review, rested his entire case on the unsupported premise that his initial questioning by the Service and his subsequent apprehension was the result of a warrantless and illegal arrest. Relying on this supposition the petitioner seeks to terminate any deportation proceedings against him and overturn his deportation order on the basis that the evidence supporting the finding of deportability was obtained in violation of the Fourth Amendment and is therefore inadmissible. Specifically, the alien charges that the Immigration Judge erred in his refusal to conduct a suppression hearing and erred by not requiring the Service to justify the legality of Alvarado's apprehension. On the basis of that erroneous conclusion Alvarado demands that a violation of the Fourth Amendment be assumed and that all evidence supporting the finding of his deportability, *i.e.*, his voluntary admissions before the Immigration Judge, be deemed to result from an unlawful arrest. In support of his demand that deportation proceedings be terminated the alien argues that: (1) "There was no evidence adduced at the deportation hearing to establish Reason to Believe that the alien was in the United States in violation of Law or Regulation. No probable cause was established to have warranted the seizure or arrest of respondent" (Petitioner's Brief, Point I); (2) "As no probable cause Nor Any Reasonable Suspicion Was Established To Justify the Seizure and Arrest of Peti-

tioner, Petitioner Should Have been Permitted to testify, The Motion to Suppress Granted, and the Proceedings Terminated." (Petitioner's Brief, Point II); (3) "Though Deportation Cases Have Held to be Civil in Nature, Fourth Amendment Protection are applicable to Petitioner. The Unlawful Arrest and Seizure of Petitioner Should Result in an Order of Suppression and a Termination of the Proceedings." (Petitioner's Brief Point III).

It is respectfully submitted that the alien's contentions are erroneous. The hearing below afforded him constitutional protections to which he was entitled and the order of the Board of Immigration Appeals was factually well founded and legally sound.

POINT I

The Nature Of The Petitioner's Arrest Does Not, Of Itself Effect The Validity Of The Deportation Proceeding.

In the deportation proceedings below and in the alien's brief for judicial review, his sole contention has been that his arrest was illegal and therefore since the Immigration Judge did not permit him to testify as to the circumstances of his underlying arrest all the evidence supporting the order of deportation should be suppressed. Although the petitioner concedes that the Service did not introduce any statements or evidence taken from Alvarado at the time of his apprehension (or at any time thereafter), and although the alien concedes in his brief that his testimony at the hearing was true, Alvarado demands that this independent testimony during the hearing must be suppressed. Quite simply, this premise is untenable. As the Board correctly noted although physical evidence may be suppressed in a

criminal proceeding, it is well-settled that despite an irregularity in an alien's arrest, an assumption which is not established in the record or reached by the Board's decision, the mere fact that the authorities may have obtained the body of an alien illegally does not render the deportation proceeding null and void. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *Avila-Gallegos* v. *Immigration and Naturalization Service*, 525 F.2d 666 (2d Cir. 1975); *LaFranca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969); *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245, 1248 (7th Cir. 1974); *Huerta-Cabrera* v. *Immigration and Naturalization Service*, 466 F.2d 759 (7th Cir. 1972); *Vlissidis* v. *Anadell*, 262 F.2d 398 (7th Cir. 1959); *Klissas* v. *Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966).

If the rule were otherwise, alien's in the petitioner's position, could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective. *Arbiol* v. *Immigration and Naturalization Service*, 73 Civ. 344 (S.D.N.Y. March 6, 1973) (Frankel, *J.*). No such absurd result is required or contemplated by the Act or the Constitution.

Since the finding of deportability in this matter was based solely upon Alvardo's testimony during the deportation hearing his argument relating to the alleged illegality of his arrest and admissions made to apprehending Service officers was at the time of his arrest clearly irrelevant in the proceedings below.*

---

* To the extent that Alvarado's argument relates to any admissions made by him at the time of his apprehension it is repeated that no such evidence was introduced at the deportation hearing. The alien's notice of motion (A.R. pp. 35-36) was

[Footnote continued on following page]

POINT II

The Deportation Order Is Supported By Clear Unequivocal And Convincing Evidence Untained By Any Illegal Arrest.

During the deportation hearing Alvarado upon examination by the Immigration Judge testified that:

(1) he was born in El Salvador and was a citizen of that country;

(2) he was not a citizen of the United States;

(3) he entered the United States by illegally cross the international border near San Ysidro, California;

(4) he was not inspected or admitted to the United States as required by law.

Contrary to Alvarado's contentions, this testimony was admissible and standing alone clearly established the alien's deportability. Pursuant to its plenary powers over immigration related matters Congress specifically

---

clearly directed at pre-hearing admissions which were never received in evidence. Therefore, despite petitioner's contentions, there was no evidence before the Immigration Judge to suppress at anytime during the hearing. In addition, in his motion Alvarado moved "to suppress all the information resulting from said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court" (A.R. p. 36). To the extent that petitioner's arguments in the administrative proceedings below, or to this Court on review, are based on the Fifth Amendment protections discussed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) we note that this argument has been rejected by this Court. *Avila-Gallegos, supra*, at 667; See also *Chavez-Raya* v. *I.N.S.*, 519 F.2d 397 (7th Cir. 1975); *Nason* v. *I.N.S.*, 370 F.2d 865 (2d Cir. 1967).

empowered Immigration Judge's the authority to take sworn testimony and examined the subject of the deportation proceeding regarding his alienage and deportability. See *Bilokumsky* v. *Tod*, *supra* at 155; *Medeiros* v. *Brownell*, 240 F.2d 634 (D.C. Cir. 1957) (alien's admission of alienage and deportability, over the objection of his counsel, held sufficient to establish deportability); See also *Matter of Laqui*, 13 I & N Dec. 232, *affirmed on review Laqui* v. *I.N.S.*, 422 F.2d 807 (7th Cir. 1970).*

Despite counsel's blanket objection to the Immigration Judge's examination during the deportation hearing, that proceeding is not regarded as a criminal proceeding and as such is not subject to the constitutional safeguards for criminal prosecutions. *Abel* v. *United States*, 362 U.S. 217, 237 (1960). While Alvarado was entitled to due process in the deportation proceedings, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), he had no constitutional right to remain mute or object to preliminary examination during the hearing regarding his alienage or right to be or remain in the United States.* Indeed, his silence might have been deemed tantamount to an admission of the facts. *Vajtauer* v. *Commissioner*, 273 U.S. 103 (1927); *Bilokumsky*, *supra*. Moreover, the Government could have compelled Alvarado's testimony in order to establish its case.** *Loufakis* v. *United States*, 81 F.2d

---

* In fact Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361 places the burden on the alien to show the time, place, and manner of entry into the United States. Furthermore, the failure to sustain that burden of proof creates a presumption that the person is in the United States in violation of law.

** Petitioner's objection to the admissibility of his testimony has been based solely upon a Fourth Amendment claim and the erroneous contention that it constitutes the fruit of the poisonous tree. At no time did Alvarado refuse to testify or invoke the Fifth Amendment privilege against self incrimination. See *Vlisidis* v. *Holland*, 245 F.2d 812 (3d Cir. 1957) cf. *Baxter* v. *Palmigiano*, 425 U.S. 309 (1975), *California* v. *Byers*, 402 U.S. 424 (1971).

966 (3d Cir. 1936); *Laqui* v. *Immigration and Naturalization Service*, 422 F.2d 343 (9th Cir. 1969). The admission of this testimony and its consideration by the Immigration Judge was therefore proper. 8 C.F.R. § 242.14(c); § 242.16(b)(c).

As Judge Van Graafeiland stated in *Avila-Gallegos*, *supra* at 667.

> Regardless of the legality of his arrest, since the petitioner's deportation hearing testimony, standing alone was sufficient to support the order of deportation, his petition for reversal of such order and dismissal and termination of the deportation proceedings should be denied (citations omitted).

This Court's decision in Avila-Gallegos is four square authority that this petition must be dismissed.*

POINT III

The Judicially Created Exclusionary Rule Should Not Be Extended By This Court To A Purely Civil Administrative Deportation Proceeding.

The petitioner also urges this Court to impose the equivalent of the Fourth Amendment exclusionary rule applicable in criminal cases to civil administrative deportation proceedings. Although we submit that this

---

* We note that counsel's firm raised identical arguments before this Court in *Avila-Gallegos*. As in this case the alien in *Avila* challenged his initial apprehension and sought to terminate the deportation proceedings despite the fact that he admitted his alienage and deportability over a blank objection of his counsel which was based upon similar Fourth Amendment claims. See Respondent's Brief, *Avila-Gallegos* v. *I.N.S.*, Docket No. 74-2647.

Court's decision in *Avila Gallegos*, *supra* is dispositive of the issues raised in this case, we also urge this Court to reject the adoption of Alvarado's expansive reading of the exclusionary rule. The adoption of petitioner's position is not warranted in civil administrative deportation proceedings.

Although the Government does not dispute that the Fourth Amendment protects aliens as well as citizens, it is respectfully submitted that the judicially created exclusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1913), only precludes the use of evidence obtained in violation of the Fourth Amendment in *criminal* proceedings against the subject of an illegal search and seizure and is inapplicable to deportation proceedings such as the case at bar. Deportation proceedings have consistently been held to be *civil* in nature and not the equivalent of criminal prosecutions. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); *Papapil* v. *Immigration and Naturalization Service*, 424 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 908 (1970).

While an alien is entitled to due process and a full and fair hearing in the deportation proceedings, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1949), the full panoply of procedural and substantive safeguards which are provided in a criminal proceeding are not required at a deportation hearing. See *Chen* v. *Immigration and Naturalization Service*, 537 F.2d 566, Docket No. 76-1065 (1st Cir., decided July 13, 1976); *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975) (failure to give *Miranda* warnings does not render the alien's statements made during custodial interrogation inadmissible in deportation proceedings); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149

(1923) (presumption of innocence does not apply in immigration proceedings); *Nason* v. *Immigration and Naturalization Service*, 370 F.2d 865 (2d Cir. 1967) (no right to counsel at preliminary investigation before immigration investigators); *Bridges* v. *Wixon*, 144 F.2d 927 (9th Cir.), *reversed on other gnds.*, 326 U.S. 135 (1945) (double jeopardy inapplicable to deportation proceedings); *Matter of Laqui*, 13 I & N Dec. 232 (cases cited therein at 233). See also *Laqui* v. *Immigration and Naturalization Service*, 422 F.2d 807 (9th Cir. 1970).

Furthermore, the extension of the application of the exclusionary rule runs counter to the analytical framework adopted by the Supreme Court in *United States* v. *Calandra*, 414 U.S. 338 (1974), wherein the Court described the exclusionary rule as,

> "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. Despite its broad deterrent purposes, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought to be most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use evidence to *incriminate* the victim of the unlawful search. [Citations omitted]. This standing rule is premised on a recognition that *the need for deterrence and hence the rationale for excluding the evidence are strongest*

> *where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.*" (Emphasis added) *Id.* at 348.

In declining to apply the exclusionary rule to grand jury proceedings the Court noted that the broad dictum of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), often relied upon for extending the exclusionary rule, had been substantially undermined by later cases. *Id.* at 352-353 n.8.

The refusal of the Court in *Calandra* to extend the exclusionary rule beyond those limited situations where Government conduct would result in the imposition of a *criminal sanction* and the application of that analysis to a civil deportation proceeding is in accord with Justice Frankfurter's decision in *Abel* v. *United States*, *supra* at 237:

> *If anything we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict then we are to protect them from searches for matter bearing on deportability.* According to the uniform decisions of this Court deportation proceedings are not subject to the Constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed (emphasis added).

More recently the Court has again examined the propriety of extending the judicially created exclusionary rule to a federal civil proceeding wherein the evidence had

been obtained in an unconstitutional search by state authorities. *United States et al.* v. *Janis*, — U.S. —, (1976), 44 U.S.L.W. 5303 (decided July 6, 1976). While *Janis* involved an attempt to extend the exclusionary rule to an intersovereign situation the Court in declining to further extend the rule noted that it had never applied the exclusionary rule "to exclude evidence from a civil proceeding, federal or state." *Id.* at 5307. Although the consequences of deportation may be severe in individual cases, *Costello* v. *Immigration and Naturalization Service*, 376 U.S. 120, 128 (1964) the purpose of expulsion by deportation is not to penalize the alien for a criminal offense but rather to administratively regulate the entry of aliens into the United States.* See *Oliver* v. *United*

---

* Judicial support for refusing to further extend the exclusionary rule to civil deportation proceedings is also found in the dissenting opinion by Justice Stewart in *Janis* in which he noted that the tax wagering statutes in question operation in an area permeated with *criminal* statutes and impose liability on a group inherently suspect of *criminal* activities. Justice Stewart noted that the tax provisions in *Janis* are intended not merely to raise revenue but also to assist law enforcement authorities in enforcing *criminal penalties* for unlawful wagering activities. It therefore appears that the judicial extension of the exclusionary rule even under the broadest interpretation would at best only be extended to civil proceedings which serve as an adjunct to the *enforcement of criminal penalties*. *Id.* at 5312. Cf. *Pizzarello* v. *United States*, 408 F.2d 570 (2d Cir. 1969); *United States* v. *Blank*, 261 F. Supp. 180 (N.D. Ohio, 1966); *Lassof* v. *Gray*, 207 F. Supp. 843 (W.D. Kentucky, 1962).

Unlike the wagering provisions in *Janis* the Immigration and Nationality Act is civil and primarily regulatory in nature. See *Matter of Lau*, Interim Decision # 2272 decided by the Board on March 19, 1974. The immigration laws do not impose liability on a group inherently suspect of *criminal activities* but rather attempt merely to regulate the immigration of aliens into the United States in accordance with the structured system created by Congress. Compare *California* v. *Byers*, 402 U.S. 424 (1971) (extension of the Fifth Amendment privilege against self incrimination is unwarranted in the context of an essentially noncriminal and regulatory state statute).

States Department of Justice, 517 F.2d 426 (2d Cir. 1975); compare *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (forfeiture was clearly a penalty for the criminal offense and was quasi criminal in nature). See *Powell* v. *Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966) (discharge proceedings analagous to proceedings involving the imposition of criminal sanctions); *Tovar* v. *Jarecki*, 83 F. Supp. 47 (N.D. Ill. 1948) *reversed on other grounds*, 173 F.2d 449 (7th Cir. 1949) assessment deemed a penalty rather than merely a tax. Acordingly, the judicial extension of the exclusonary rule to a deportaton proceeding especially to the extent demanded by the petitioner is clearly unwarranted in this civil proceeding.* See also *Stone* v. *Powell*, — U.S. — (1976), 44 U.S.L.W. 5313 (decided July 6, 1976) (concurring opinion of Chief Justice Burger at 5323). See also *N.L.R.B.* v. *South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969). Compare *Kogers* v. *United States*, 97 F.2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D.C. Mont. 1920), *appeal dismssed*, 267 Fed. 1022 (9th Cr. 1920).

---

* Prior to the Court's decision in *Janis* various Courts of Appeals have rejected extending the exclusionary, rule: *United States ex rel Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States* v. *Schipani*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *United States* v. *Winsett*, 518 F.2d 51 (9th Cir. 1975). See also *Ekelund* v. *Secretary of Commerce*, 418 F. Supp. 102, 106 (U.S.D.C., E.D.N.Y. 1976) *appeal pending* Docket No. 76-6155 (2d Cir.):

> "Finally, the use of the evidence discovered in the search in the disciplinary proceeding must be considered in light of the fact that it is a civil proceeding. The consequences of the proceeding are grave, but it is not a criminal proceeding, and in no true sense is the proceeding punitive or vindictive, nor is it a forfeiture proceeding. Rather it is a determination of unfitness for training for command rank in the merchant marine. In such a case the use in evidence of that which might be excluded in a criminal case does not involve an invasion of a constitutionally protected interest. The searching re-examination of the question in

[Footnote continued on following page]

The alien demands this expansive coverage in a case where the Government has not shown any interest in obtaining a criminal conviction and has merely attempted to effect the removal of an alien illegally residing in the United States until such time as that alien is able to obtain a legal admission as an immigrant. It is submitted that the concurring opinion of Chief Justice Burger in *Stone* v. *Pollack*, *supra* at 5323, is noteworthy in regard to Alvarado's argument:

> "Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge created device based on 'hard cases,' serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect. In the face of dwindling support for the rule some would go so far as to extend it to *civil* cases. *United States* v. *Janis*, *supra*.
>
> To vindicate the continued existence of this judge made rule, it is incumbent upon those who seek its retention—and surely its extension—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law."

Contrary to Alvarado's contentions the exclusionary rule is not a personal right,* but a judicially created remedy which is "grudgingly taken, medicament; no

---

United States v. *Janis*, 1976, U.S. , 96 S. Ct. 3021, 48 L. Ed. 2d , emphasizes how dubious is the principle of exclusion even as applied in criminal cases and the further damage to the search for truth that must flow from uselessly extending it to civil cases. (Note the second sentence of footnote 31).

* *United States* v. *Calandra*, *supra* at 348.

more should be swallowed than is needed to combat the disease." Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U.Pa. L. Rev. 378, 389 (1964).

It is respectfully submitted that an illegal alien's desire to delay his deportation and continue illegal employment in the United States, will be primarily served by either the introduction of suppression hearings or the extension of the exclusionary rule into purely civil fact finding proceedings.* The former will merely enable many if not all illegal and deportable aliens to further delay their proper expulsion from the United States. See *Avila Gallegos, supra* at 666 n.1. The latter would merely encourage aliens charged with deportability to stand mute at their hearings after alleging an illegal arrest causing the taxpayers, through the Service, to call agency personnel and other persons to testify at deportation hearings in order to establish deportability.** Further under the petitioner's application of the exclusionary rule in any case where a Fourth Amendment violation did occur the Government, despite its plenary power over immigration, see *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), could well be precluded from obtaining the removal of even the most antisocial

---

* To the contrary substantial reasons for not invoking the exclusionary rule are described in the concurring opinions in *Brignoni-Ponce*, 422 U.S. 873 (1975). See concurring opinions of Burger, *C.J.* and White, *J.*

** See *Matter of Laqui*, 13 I & N Dec. 232, 235:

> "Effective enforcement of the immigration laws requires that the true facts be established with a minimum of delay. If the subject of an inquiry is permitted to remain mute, the Service must resort to other sources to establish the facts, and this usually takes additional time, trouble, and expense. We see no valid reason to impose on the Service this extra burden which confers no corresponding legitimate benefit on the alien or any one else. Delay as an end in itself, whether achieved by obstructionism or dilatory tactic, cannot in our view be a legitimate objective."

or dangerous alien who entered the United States illegally. If the extension proposed by Alvarado were accepted, aliens could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective.

Nor does the Supreme Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), relied upon by the petitioner, compel the extension of this rule as demanded by the alien petitioner. *Brignoni-Ponce* did not relate to on the street questioning by Service officers. *Id.* at 884 n.9. To the contrary, although the Court applied the exclusionary rule to the driver of the automobile who was charged with two criminal counts under 8 U.S.C. § 1324, nothing in the Court's opinion remotely suggests that the application of the exclusionary rule would also be applied to the illegal entrant, passengers during a subsequent civil deportation hearing. In view of the potential for delay if applied to the administrative deportation proceedings, the vast number of aliens who could frustrate the enforcement of the immigration laws by invoking the exclusionary rule merely for delay, and the availability of alternative remedies should any violation of Constitutional rights of individuals be established, see *Illinois Migrant Council et al* v. *Pilliod et al*, — F.2d — (7th Cir. 1976), *modified on rehearing en banc* Docket No. 75-2019 (January 26, 1977).

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
February, 1977.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
ROBERT S. GROBAN, JR.,
Special Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 714-017-019

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Thomas H. Belote being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 28th day of February 1977 he served two copies of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Oltarsh, Flattery & Oltarsh
225 Broadway
New York, New York 10007

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Thomas H. Belote

Sworn to before me this
1st day of March, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632981
Qualified in New York County
Commission Expires March 30, 1978

23